DAVID WONG HON LEONG

v.

NOORAZMAN BIN ADNAN

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATUK SHAIK DAUD BIN HJ. MOHD. ISMAIL JCA
DATO' V.C. GEORGE JCA
[CIVIL APPEAL NO. W-02-34-1994]
28 SEPTEMBER 1995

CONTRACT: *Formation - Consideration - Whether consideration must be executed - Executory consideration - Whether sufficient - Promise in exchange for a promise - Whether good consideration in law - Contracts Act 1950 s. 2(d) & (e).*

CONTRACT: *Oral agreement - Breach of promise - Defence that agreement void for illegality - Allegation that agreement tainted with elements of bribery - Failure to timeously lodge police report - Effect - Whether allegation only an afterthought - Contracts Act 1950 ss. 24, 25.*

The appellant was a director of a company known as Wealth Sdn. Bhd.. The company intended to develop its agricultural land into a housing estate and subsequently submitted an application to the Land Administrator for conversion and subdivision of the land. In the meanwhile, to obtain speedy approval of the application, the appellant sought the respondent's assistance, and verbally agreed to pay the respondent RM268,000 for his services. Following that, on 28 January 1991, the respondent wrote a letter to the Menteri Besar on behalf of the company asking for the latter's assistance for an early approval of the application. The Menteri Besar made a notation on the letter telling the Land Administrator that he was supportive of the application, and some eight months later, the application was approved by the State Authority.

The appellant paid the respondant RM100,000 after having seen the Menteri Besar's notation aforesaid but refused to pay the balance. Following the respondent's claim for the balance sum, and for an additional RM100,000 for resolving the problem regarding access to the land, the appellant argued before the learned Judge that the oral promise was unenforceable for lack of consideration, and secondly, that the monies paid to the respondent and what remained due to him were a bribe to the Menteri Besar and other State officials, and the agreement, therefore, was illegal and void by reason of ss. 24 & 25 of the Contracts Act.

The learned Judge ruled that except for the additional claim of RM100,000, no triable issue had been raised by the appellant. The Judge consequently granted leave for the defendant to defend the claim for the additional RM100,000, but otherwise allowed the respondent's claim. The appellant appealed and reiterated before the appeal Judges virtually the same points raised in the Court below.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] It is not and has never been the law in this country that to support an agreement, consideration must always be executed. Executory consideration suffices.

[2] There was here a promise made by the respondent that he would assist in obtaining

the required approval for conversion and subdivision of the company's land. The appellant in turn promised that he would pay the respondent RM268,888 for that service. One therefore has *ab initio* a promise in exchange for a promise. This is good consideration in law.

[3] In any case the submission that the respondent did nothing to earn his fee was unmeritorious. Upon the facts the respondent did expend his exertions in securing the Menteri Besar's support for the company's application and the approval, much sought after by the appellant and the company, was obtained. The respondent had thus "delivered the goods".

[4] The appellant was not able to demonstrate that the learned Judge had erred in any way. This is not a case where a *bona fide* triable issue has been raised. Indeed the appellant's conduct leaves no doubt that the issues raised are in truth *mala fide*. Clearly the appeal is lacking in merits.

Per curiam:

There are cases - business and mercantile cases - in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.

It is surprising thus that the learned Judge was reluctant to enter judgment for the additional sum of RM100,000 when the appellant had failed to respond to the respondent's letter confirming an agreement between them whereby the latter was to receive an additional fee of RM100,000 if he assisted in resolving the problem regarding the access. Had there been a cross appeal by the respondent against the learned Judge's order granting leave to the appellant to defend in respect of this additional fee, this Court may well have been minded to reverse the learned Judge's decision and enter final judgment for this sum.

[Appeal dismissed. Orders of Court below affirmed].

[Bahasa Malaysia Translation of Headnotes]

KONTRAK: *Pembentukan - Samada balasan harus disempurnakan - Balasan dalam pelaksanaan - Samada memadai - Janji sebagai tukaran suatu janji - Samada balasan yang baik di sisi undang-undang - Akta Kontrak 1950 s. 2(d) & (e).*

KONTRAK: *Perjanjian lisan - Kemungkiran janji - Pembelaan bahawa perjanjian tak sah kerana penyalahan undang-undang - Pengataan bahawa perjanjian tercemar dengan unsur-unsur rasuah - Kegagalan membuat laporan polis pada masanya - Kesan - Samada pengataan hanya sesuatu yang difikirkan kemudian - Akta Kontrak 1950 ss. 24, 25.*

Perayu adalah pengarah sebuah syarikat yang dikenali sebagai Wealth Sdn. Bhd.. Syarikat tersebut berniat untuk memajukan tanah pertaniannya kepada sebuah kawasan perumahan dan berikutan itu telah mengemukakan satu permohonan kepada Pentadbir Tanah untuk penukaran dan memecahbahagi tanah tersebut. Sementara itu, bagi mendapatkan kelulusan segera bagi permohonan tersebut, perayu telah rnendapatkan bantuan responden dan secara lisan bersetuju untuk membayar responden RM268,000 untuk perkhidmatannya. Berikutan itu, pada 28 Januari 1991, responden telah menulis surat kepada Menteri Besar bagi pihak syarikat tersebut meminta bantuan Menteri Besar bagi kelulusan awal permohonan tersebut, Menteri Besar telah membuat suatu nota pada surat tersebut memberitahu Pentadbir Tanah bahawa beliau menyokong permohonan tersebut, dan lebih kurang 8 bulan kemudiannya, permohonan tersebut telah diluluskan oleh Pihak Berkuasa Negeri.

Perayu telah membayar responden sebanyak RM100,000 setelah melihat nota Menteri Besar sebagaimana yang tersebut di atas tetapi enggan membayar bakinya. Berikutan dengan tuntutan responden untuk jumlah baki tersebut, dan bagi jumlah tambahan sebanyak RM100,000 kerana menyelesaikan masalah berhubung dengan jalan masuk ke tanah tersebut, perayu berhujah di hadapan Hakim yang bijaksana bahawa janji lisan tersebut tidak dapat dikuatkuasakan kerana ketiadaan balasan, dan keduanya, bahawa wang yang telah dibayar kepada responden dan apa yang tinggal sebagai baki adalah merupakan rasuah kepada Menteri Besar dan pegawai-pegawai negeri yang lain dan perjanjian tersebut, adalah dengan itu tidak sah di sisi undang-undang menurut ss. 24 dan 25 Akta Kontrak.

Hakim yang bijaksana memutuskan bahawa selain tuntutan tambahan sebanyak RM100,000 tidak terdapat isu-isu yang boleh dibicarakan yang telah dibangkitkan oleh perayu. Hakim kemudiannya telah memberikan kebenaran bagi defendan membela tuntutan untuk jumlah tambahan sebanyak RM100,000, dan seterusnya membenarkan tuntutan responden. Perayu telah merayu dan mengulangi di hadapan Hakim-hakim perkara-perkara yang sama seperti yang dibangkitkan dalam Mahkamah di bawah.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Ianya bukan dan tidak pernah menjadi undang-undang dalam negeri ini bahawa untuk menyokong sesuatu perjanjian, balasan mestilah sentiasa disempurnakan. Balasan yang sedang dalam pelaksanaan memadai.

[2] Disini terdapat janji yang dibuat oleh responden bahawa beliau akan membantu mendapatkan kelulusan yang diperlukan untuk penukaran dan pecahbahagi tanah syarikat tersebut. Perayu sebaliknya berjanji bahawa beliau akan membayar responden sebanyak RM268,888 untuk perkhidmatan itu. Dengan itu secara, *ab initio,* terdapat suatu janji bagi suatu janji yang lain. Ini adalah suatu balasan yang baik di sisi undang-undang.

[3] Walau apa pun, penghujahan bahawa responden tidak melakukan apa-apa untuk mendapatkan feenya adalah tidak bermerit. Atas fakta responden telah membuat sesuatu untuk mendapatkan sokongan Menteri Besar terhadap permohonan syarikat tersebut dan kelulusan tersebut, yang sangat-sangat diperlukan oleh perayu dan syarikat tersebut, telah diperolehi. Responden dengan itu telah, "delivered the goods".

[4] Perayu tidak dapat menunjukkan bahawa Hakim yang bijaksana telah tersalah pertimbangan di sisi undang-undang dalam apa cara pun. Ini bukannya kes di mana isu-isu *bona fide* yang boleh dibicarakan telah dibangkitkan. Sesungguhnya kelakuan perayu tidak menimbulkan keraguan bahawa isu-isu yang telah dibangkitkan adalah sebenarnya *mala fides.* Jelasnya rayuan disini ketiadaan merit.

Per curiam:

Terdapatnya kes-kes perniagaan dan mercantile - dalam mana Mahkamah telah mengambil. perhatian bahawa, dalam perjalanan biasa perniagaan, jika seseorang peniaga menyatakan dalam sepucuk surat kepada seorang peniaga yang lain bahawa beliau telah bersetuju untuk melakukan sesuatu perkara, orang yang menerima surat tersebut seharusnya menjawab surat tersebut jika ianya berniat untuk mempertikaikan fakta bahawa beliau bersetuju sedemikian.

Ianya adalah dengan itu menghairankan bahawa Hakim yang bijaksana agak ragu-ragu untuk memberikan penghakiman bagi jumlah tambahan sebanyak RM100,000 bilamana perayu gagal untuk menjawab surat responden mengesahkan suatu persetujuan di antara mereka di mana pihak yang terkemudian harus menerima fee tambahan sebanyak RM100,000 jika beliau

membantu dalam masalah berhubung dengan jalan masuk tersebut. Sekiranya terdapat rayuan bersilang oleh responden terhadap perintah Hakim yang bijaksana yang memberikan kebenaran kepada perayu untuk membuat pembelaan bagi fee tambahan ini, Mahkamah ini sesungguhnya telah memikirkan untuk mengakaskan keputusan Hakim yang bijaksana dan memasukkan penghakiman muktamad bagi jumlah ini.

[Rayuan ditolak. Perintah Mahkamah di bawah disahkan].

Cases referred to:
Tan Cheng Hock v. Chan Thean Soo [1987] 2 MLJ 479 ***(refd)***
Koh Siak Poo v. Perkayuan OKS Sdn. Bhd. [1989] 3 MLJ 164 ***(refd)***
Lampleigh v. Brathwait [1615] Hob. 105 ***(foll)***

Legislation referred to:
Contract Act 1950, s. 2(d), (e), 24, 25

For the appellant - P.M. Mahalingam; M/s. P.M. Mahalingam & Co.
For the respondent - Benjamin Yean (Chew Chang Min with him); M/s. Liza Chan & Co.

JUDGMENT

Gopal Sri Ram JCA:

This an appeal against the order of the High Court at Kuala Lumpur made upon the respondent's summons for judgment. In his writ the respondent claimed the sum of RM268,888 against the appellant. The learned Judge entered judgment against the appellant for the sum of RM168,888 but gave him unconditional leave to defend in respect of the balance. There is no cross-appeal by the respondent against this latter order. The factual background to this case may be briefly stated.

The appellant is one of the shareholders of a private limited company known as Wealth Sdn. Bhd. ("the company"). He is also one of its directors. The company was at all material times the registered proprietor of three lots of land in the Mukim of Kajang. The land in question adjoins a rather prestigious housing development known as "Country Heights". At the time the company acquired the land it was classified as agricultural land. The company intended to develop it. There was therefore a need to convert its use from agricultural to housing and to have it subdivided. There was also a problem of access from the land in question through Country Heights. It is common ground that the appellant considered the gaining of this right of way to the land as a matter of importance as it would have the effect of enhancing the land's value. The company accordingly engaged a firm of surveyors to prepare the necessary documents for submission to the appropriate authority for conversion and subdivision. The surveyors, having completed the necessary documentation, submitted the same to the office of the Land Administrator in and for the District of Ulu Langat on 26 January 1991 for consideration.

At about this time, the appellant was introduced to the respondent and sought his assistance in connection with the conversion and subdivision. According to the appellant, the respondent told him that he knew the Menteri Besar for the State of Selangor and other senior State Government officers and that he was prepared to assist in the matter. He expected to be paid for his services. He asked for a fee of RM268,888. It is not disputed that the appellant, in his personal capacity, agreed to pay this fee if the respondent would assist in obtaining speedy approval from the State Authority of the company's application for conversion and subdivision.

On 28 January 1991, a letter was written to the Menteri Besar. The company's letterhead was used. It bore the signature of the respondent who was designated "Project Manager".

It is obvious that this letterhead was furnished by the appellant to the respondent to enable the latter to make representations on the company's behalf. The letter referred to the company's application for conversion and subdivision. It asked for assistance from the Menteri Besar for an early approval of the application.

Sometime later, the respondent produced this very letter to the appellant. Across a space atop the letter, there appears a handwritten note addressed to the Land Administrator for the District of Ulu Langat. It reads "Di sokong." There is a signature below the notation. The appellant does not dispute that it is indeed the signature of the Menteri Besar. Having seen this letter, the appellant paid RM100,000 to the respondent. It is common ground that the respondent did not give any receipt for this sum. Counsel for the appellant, during his argument before us, repeatedly complained of this. But the respondent and his solicitors have been absolutely frank and honest about it. They have acknowledged, in the statement of claim, the receipt of this sum. So the complaint by Counsel in respect of is comes to naught.

The undisputed documentary evidence shows that the Standing Committee approved the company's application on 22 July 1992, and that the State Executive Council gave its approval on 12 August 1992. By a letter dated 16 September 1992, the Land Administrator for the District of Ulu Langat informed the company that its application had been approved. It appears that by this stage the all important question of the access had not been addressed by either the company or the appellant. The evidence shows that that came later.

On 17 December 1991, the respondent wrote to the appellant confirming an agreement between them whereby the former was to receive an additional fee of RM100,000 if he assisted in resolving the problem regarding the access. It is the respondent's case that he did in fact obtain the required access through his exertions. The appellant, however, denies any agreement to pay the additional fee. In respect of this sum, the learned Judge granted leave to defend. We would digress for a moment to say a few words about this latter order of the learned Judge.

During argument, we registered our surprise at the learned Judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.

In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr. J. in *Tan Cheng Hock v. Chan Thean Soo* [1987] 2 MLJ 479-487:

> In *Wiedemann v. Walpole* [1891] 2 Q.B. 534, 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher M.R., in his judgment, remarked,
>
> > Here, we have only to see whether *the mere fact* of not answering the letters, *with nothing else* for us to consider is any evidence in corroboration of the promise.' (Emphasis added). Earlier, in his judgment, he said, **'Now there are cases - business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.** (The emphasis is ours.)

But there was no cross-appeal by the respondent against the order of the learned Judge granting unconditional leave to the appellant to defend in respect of the sum of RM100,000. This is because the respondent unreservedly accepted the view expressed by the learned Judge during argument in support of the order that he proposed to make. Had there been such a cross-appeal, we **may** well have been minded to reverse the learned Judge and to enter final judgment for this remaining sum.

The note taken by the learned Judge of the arguments addressed to him reflect the defences taken by the appellant to the respondent's claim. It reads as follows:

> **Mr. Mahalingam**
>
> With regard to the $268,888 claim, our defences are as follow:
>
> (i) the plaintiff told the defendant that he knew the Menteri Besar of Selangor, some ex co members and some government officers and he was promised that he could expedite the conversion of the property. That would be illegal under s. 24 and 25 of the Contracts Act;
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> (ii) he did nothing; therefore there was no consideration;
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> (iii) they took this big sum of money and did nothing;
>
> (iv) time was of the essence. He said he would do it within one year but conversion was done more than a year.

The learned Judge rejected, and in our view rightly so, all the foregoing defences and held each of them not to amount to *bona fide* triable issues. Before us, Counsel for the appellant reagitated only issues (i), (ii) and (iii). He did not pursue the argument that time was of the essence of the agreement. Since the learned Judge delivered no written reasons for his decision, and this appeal being in the nature of a rehearing (see, *Koh Siak Poo v. Perkayuan OKS Sdn. Bhd.* [1989] 3 MLJ 164), it is incumbent for us to deal with the issues raised before us by the appellant.

It is convenient for us to take the second and third points first. They have to do with the question of consideration. The appellant argued that there was no consideration for the agreement between the parties. The Judge held there was. In our view, the learned Judge was right.

The argument based on absence of consideration, in our view, overlooks the fundamental principles governing this area of the law of contract. The facts relevant to the point are these. There was the promise made by the respondent that he would assist in obtaining the required approval for conversion and subdivision of the company's land. The appellant in turn promised, and this is common ground, that he would pay the respondent RM268,888 for that service. One therefore has in the present case, *ab initio*, a promise in exchange for a promise. In our judgment, this is good consideration in law. We shall explain momentarily why we hold this opinion.

Now, it is well settled that consideration may be executory or executed. If A agrees to mow B's lawn for RM10 and B agrees to pay him RM10 in exchange for this service, there is, in the eyes of the law, a valid and binding agreement between A and B. This is borne out by the words of s. 2(e) of the Contracts Act 1950 which declares:

> (e) every promise and every set of promises forming the consideration for each other, is an agreement.

The consideration in such a case is said to be executory, namely, the exchange of the mutual promises. When the lawn is mowed, the act promised has been done and the consideration is said to have become executed. It is not and has never been the law of this country that to support an agreement, consideration must always be executed. Executory consideration suffices. Of course, A's right to sue for the RM10 may not arise until he has performed his part of the bargain or has been prevented by B from performing it.

The illustration we have given and the principle we have stated are so elementary that they may be found in any standard work upon the subject.

But we have compelled to do so because a reading of the Judge's note of the proceedings in the Court below has left us with the distinct impression that these elementary propositions may have been misunderstood by the appellant and by the Court.

The submission that the respondent did nothing to earn his fee is equally unmeritorious. To recall, upon the facts in respect of which the appellant raises no dispute, the respondent did expend his exertions in securing the Menteri Besar's support for the company's application. The approval, much sought after by the appellant and the company, was obtained. In the words of Counsel for the appellant when he addresed us on this point, "The respondent delivered the goods". In the light of this telling concession, it is an amazement that the appellant is able to submit that the respondent did nothing to earn his fee.

The actions of the respondent come well within the terms of s. 2(d) of the Contracts Act 1950 which reads as follows:

> (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

The position of the respondent before us is, at the very least, not dissimilar from that of the successful plaintiff in *Lampleigh v. Brathwait* [1615] Hob. 105, who, in order to obtain a pardon for the defendant Brathwait, at the latter's request, exerted himself "riding and journeying to and from London and Newmarket" at his own expense. Brathwait later promised to pay him £100 for his trouble, but failed to do so. Lampleigh sued in assumpsit and succeeded on the ground that his services had been rendered at the previous request. If Lampleigh could recover for his exertions it is a little difficult to understand why the instant respondent should not.

We now turn to consider the submission that the agreement is void for illegality. The gist of the appellant's submission on this point is twofold. First it is said that he was deceived into believing that approval would be granted when in fact it had already been granted. Second, it is submitted that the monies paid to the respondent and what remains due to him were in fact a bribe to corruptly obtain from the Menteri Besar and other State officials their support for the company's application.

We take the allegation of cheating - the term employed by Counsel before us - first. The factual chronology upon which Encik Mahalingam relies in support of this allegation does not assist the appellant. This is not a case where by means of a false representation, the respondent obtained a pecuniary advantage from the appellant or even the company. He was asked to help. He agreed, but asked for a fee. He did deliver the goods and received part payment. So one may well be justified in asking: Where is the cheating or deception? Add to this the fact that in one of his affidavits the appellant alleged that the handwritten

note appearing on the letter of 28 January 1991 was false and was not even that of the Menteri Besar, an allegation that was as speedily withdrawn as it was made. This leads us to form the view that the appellant is a man who is prepared to make unfounded allegations at the drop of a hat.

We now turn to the charge of bribery. This is a most serious allegation in which is housed the implication that the appellant was a person who was prepared to indulge in the bribery of public officials in order to achieve his purpose. Now let us say at once that there is not an iota of independent evidence to support this charge. It does not find mention in the appellant's first affidavit delivered in opposition to the respondent's summons for judgment.

The appellant did not lodge a contemporaneous police report complaining about the demand for a bribe. Indeed, he only lodged a police report during an adjournment in the proceedings and annexed it to an affidavit of his delivered well after the hearing of the respondent's summons had commenced. This act of the appellant was prompted, no doubt, by the observation by the learned Judge during the hearing that no report had been lodged at the material time. The failure of the appellant to lodge a contemporaneous police report led the learned Judge to make the following remark which appears in the note of the proceedings recorded by him:

> The fact that you are prepared to lodge a report only after I have pointed it out to you that it should have been done immediately, will go to show that the tale that your client has told is far fetched. If it is true, he would have reported it to the police at once without paying the bribe. If he has paid the bribe, he has committed an offence. If that is so, it is my duty to send the papers to the public prosecutor. If you raise this defence, then you must have admitted to corruption.

Later, after the Court resumed the hearing, Counsel informed the learned Judge that a report had been lodged during the adjournment. This led to the following exchange between the Judge and Counsel:

> **Mr. Mahalingam**
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> My client has lodged a report just now.
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> Chan J.: You have missed the point. What I have told you before the lunch break is that your client has admitted to me just now through you that he has committed a criminal offence in that he had paid over a sum of money for the purpose of bribery. I then adjourned the matter for you to think it over and to be careful of what you say. So by what you have just told us, you are still insisting that the defence is that your client was a party to a crime. This leaves me with no choice but to adjourn the matter so that I can take the necessary steps to inform the police.
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> Adjourned to Monday (4 October 1993).

The affidavit exhibiting the police report came on file on 6 October 1993.

We entirely agree with the approach of the learned Judge to the weight to be given to the failure of the appellant to timeously lodge a report with the police. Further, an examination of the conduct of the appellant after the commencement of the litigation; his failure to raise this matter at the earliest opportunity in his first affidavit, and producing it, as a conjurer does, like a rabbit out of a hat; leaves us in no doubt, as it did the learned Judge, that the tale was an afterthought, the machinations of a desperate litigant trying every trick in the book to escape judgment being entered against him.

We would add that the charge of bribery, even when made in civil proceedings, is a serious charge. It is akin to a charge of fraud, or a plea of justification in a libel action. It should not be lightly taken in the absence of convincing evidence in the hands of the advocate having conduct of the cause. A solicitor who makes such a charge without foundation faces the risk of being disciplined for misconduct. And one must not overlook the fact that the charge in this case has been leveled against an elected official; the chief executive of a State Government.

The appellant was not able to demonstrate to us that the learned Judge had erred in any way. This is not a case where a *bona fide* triable issue has been raised. Indeed, the appellant's conduct leaves us in no doubt that the issues raised are in truth *mala fide*. Convinced as we were of the lack of any merits in the appeal, we dismissed it without calling upon Counsel for the respondent to reply. The orders made by the Judge in the Court below were affirmed and the respondent was awarded the costs of this appeal, towards the account of which the deposit paid into Court by the appellant was directed to be paid to the respondent.